

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
(Before O’Connell, PJ, and Meter and Gadola, JJ)

CLAM LAKE TOWNSHIP, a Michigan  
general law township; and  
HARING CHARTER TOWNSHIP, a Michigan  
charter township

Appellants,

v

THE STATE BOUNDARY COMMISSION,  
an administrative agency within the Michigan  
Department of Licensing and Regulatory  
Affairs; TERIDEE LLC, a Michigan limited  
liability company; and THE CITY OF  
CADILLAC, a Michigan home rule city,

Appellees.

Supreme Court Case No. 151800

Court of Appeals Docket No. 325350

Wexford County Circuit Court  
Case No. 14-25391-AA

State Boundary Commission Docket  
No. 13-AP-2

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**APPELLEE CITY OF CADILLAC’S CORRECTED BRIEF ON APPEAL**  
**ORAL ARGUMENT REQUESTED**

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**JURISDICTIONAL STATEMENT**

Appellee, the City of Cadillac, agrees with the jurisdictional statement in the Brief filed by Appellants, Haring Charter Township and Clam Lake Township.

## **STATEMENT OF QUESTIONS PRESENTED**

- I. Under Act 425 of 1984, which allows conditional transfers of property between local governmental units for the purpose of an economic development project, an annexation cannot occur while an agreement under Act 425 is “in effect.”

In *Casco Township v State Boundary Commission*, the Court of Appeals held that the State Boundary Commission may determine whether an Act 425 agreement is “in effect” (*i.e.*, whether it is a bona fide agreement and not a fictional or “sham” agreement) and thereby determine whether the Commission has jurisdiction over the annexation petition, without requiring a collateral circuit court proceeding. *Casco* was based on more than 50 years of case law from this Court holding that administrative agencies are competent to determine their own jurisdiction.

### **Should this Court uphold *Casco*?**

The State Boundary Commission answered:	Implicitly, yes.
The circuit court answered:	Implicitly, yes.
Appellee, the City of Cadillac, answers:	Yes.
Appellee, TeriDee LLC, will answer:	Yes.
Appellee, the Attorney General, will answer:	Yes.
Appellants, the Townships, answer:	No.

- II. In this appeal, the State Boundary Commission determined that the Act 425 agreement approved by Haring Township and Clam Lake Township was a “sham” agreement that did not divest the Commission of jurisdiction over the property owner’s annexation petition. The Commission approved the annexation based on a record of more than 2,000 pages of documents, in addition to the testimony and argument received at the public hearing.

### **Was the Commission’s decision supported by competent, material, and substantial evidence on the whole record?**

The State Boundary Commission answered:	Yes.
The circuit court answered:	Yes.
Appellee, the City of Cadillac, answers:	Yes.
Appellee, TeriDee LLC, will answer:	Yes.
Appellee, the Attorney General, will answer:	Yes.
Appellants, the Townships, answer:	No.

- III. The Home Rule City Act provides that an annexation petition must be rejected if a prior annexation request for the same property was denied “within the preceding 2 years.” Here, the developer’s second annexation petition was filed more than two years after its first (unsuccessful) petition.

The Townships, who oppose annexation, belatedly argued on appeal that even though the second petition was filed after the expiration of the two-year period, the second petition should nonetheless be rejected based on the doctrine of collateral estoppel.

**Did the circuit court properly reject the Townships’ collateral estoppel argument?**

The State Boundary Commission answered:	<i>Did not address.</i>
The circuit court answered:	Yes.
Appellee, the City of Cadillac, answers:	Yes.
Appellee, TeriDee LLC, will answer:	Yes.
Appellee, the Attorney General, will answer:	Yes.
Appellants, the Townships, answer:	No.

## INTRODUCTION

This appeal centers on the State Boundary Commission's authority to determine whether it has jurisdiction over an annexation petition. For more than 50 years, this Court has held that an administrative agency is competent to determine its own jurisdiction, without intervention by the courts. The Court of Appeals has followed this Court's decisions and, in the case of *Casco Township v State Boundary Commission*<sup>1</sup>, held that the State Boundary Commission was authorized to review an agreement adopted under Act 425<sup>2</sup> which, if deemed to be "in effect," would divest the Commission of jurisdiction over an annexation petition for the same property.

Now, Appellants Haring Charter Township and Clam Lake Township (the "Townships") ask this Court to overturn *Casco* and hold that a party seeking annexation must file a collateral circuit court action to determine whether the Commission has jurisdiction whenever an Act 425 agreement allegedly exists – even if the Act 425 agreement is a sham agreement designed to thwart the Commission's jurisdiction, and even if it the agreement was contrived solely to block economic development, contrary to the purpose of Act 425.

Such are the facts in this appeal. For years, the Townships have fiercely opposed the development of vacant property located in Clam Lake Township, which is owned by Appellee, TeriDee, LLC ("TeriDee"). TeriDee seeks to develop the property to spur economic growth and create hundreds of jobs in an economically depressed area. After Clam Lake blocked TeriDee's development efforts, TeriDee filed an annexation petition in 2011 to conditionally transfer the property into the boundaries of Appellee, City of Cadillac ("City"). Clam Lake immediately entered into a sham Act 425 Agreement with Haring Township in a transparent attempt to block

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<sup>1</sup> 243 Mich App 392; 622 NW2d 332 (2000).

<sup>2</sup> Public Act 425 of 1984, MCL 124.21 *et seq.* ("Act 425").



the annexation, which the State Boundary Commission (“Commission”) found was an invalid, illusory agreement. The Commission, however, denied the annexation petition for other reasons.

Two years later, upon hearing a rumor that TeriDee would be filing a new annexation petition, Clam Lake and Haring cooked up another sham Act 425 Agreement to attempt to divest the Commission of jurisdiction over the annexation request. After receiving voluminous evidence consisting of more than 2,000 pages of documents and after conducting a public hearing, the Commission, relying on *Casco*, found that the Act 425 Agreement was, once again, a sham agreement that did not deprive the Commission of jurisdiction over the annexation petition. The Commission thereafter approved TeriDee’s annexation request. The Townships appealed, and the Wexford County Circuit Court affirmed the Commission’s decision, finding that it was authorized by law supported by competent, material, and substantial evidence on the whole record. The Court of Appeals denied leave to appeal, and the Townships filed an Application with this Court, which was granted.

Meanwhile, in the companion case, TeriDee filed suit against the Townships in circuit court to challenge the Act 425 Agreement. The circuit court ultimately held that the Act 425 Agreement was void as against public policy because it contracts away Haring Township’s legislative zoning powers, but the circuit court deferred to the Commission to determine whether the agreement was a “sham” under *Casco*. Notably, in the companion case, the Townships argued that the Commission (and not the circuit court) had jurisdiction to determine whether the Act 425 Agreement was a sham – which is the opposite of the position they take in this appeal.

The circuit court’s decisions in both cases should be affirmed. In this appeal, the City submits that *Casco* was correctly decided, as it is consistent with decades of case law holding that administrative agencies are competent to determine their own jurisdiction. Moreover, given

the reliance of local governments and developers on *Casco* and the absence of any changes in the law since the case was decided, the principle of stare decisis requires that *Casco* be upheld.

On the merits, the Commission's factual finding that the Townships' Act 425 Agreement was a sham and its decision to approve the annexation should be affirmed. The Commission's decisions were authorized by law and supported by competent, material, and substantial evidence on the record, including evidence of e-mails between Township officials revealing that the Townships concocted the Act 425 Agreement to block development and to strip the Commission of its jurisdiction over TeriDee's annexation petition. The Commission has *twice* found that the Townships' Act 425 Agreements were fictional agreements designed to "game" the system, and the circuit court has independently found that the latest Act 425 Agreement is against public policy. The Townships are not entitled to any relief from this Court in either appeal.

Finally, the Commission's review of TeriDee's second annexation petition was not barred by the doctrine of collateral estoppel. The Home Rule City Act provides that an annexation petition must be rejected if a prior annexation request for the same property was denied "within the preceding 2 years." MCL 117.9. By creating only a two-year bar for new petitions, the Legislature clearly intended to allow new petitions after the expiration of that two-year period, and collateral estoppel cannot be used to thwart legislative intent. In any event, collateral estoppel does not apply to legislative decisions made by administrative agencies, and the Commission's approval of annexation petitions is a legislative function.

For these reasons, the City requests that this Court uphold the *Casco* decision and affirm the decisions of the Wexford County Circuit Court and State Boundary Commission.

## **STATEMENT OF FACTS**

### **I. History of Efforts to Develop the Property & First Annexation Petition**

This case involves approximately 241 acres of real property located near M-55 and US-131 in Wexford County, Michigan. The property is owned by Appellee, TeriDee. TeriDee filed its first annexation petition on June 3, 2011, requesting annexation of the property from Clam Lake to the City. Appellants' Appendix, 131a. The proposed annexation would have facilitated a commercial development project that would create an estimated 850 to 1,000 jobs.

After TeriDee filed its 2011 annexation petition, Clam Lake and Haring hurriedly cobbled together an agreement under Public Act 425 of 1984 ("Act 425") that contemplated some unspecified, future development for the same land. E-mails between Clam Lake and Haring officials made clear that the 2011 agreement was engineered to "deny the Commission jurisdiction over the proposed annexation." Appellee's Appendix, 008b. The Commission concluded that "the 425 Agreement was created solely as a means to bar the annexation and not as a means of promoting economic development." *Id.*, 006b. Although the Commission found that the Act 425 Agreement was invalid, the Commission nonetheless recommended denial of the annexation request at that time. *Id.*, 002b.

### **II. Second Annexation Petition**

On April 11, 2013, a City of Cadillac official notified Clam Lake that TeriDee intended to file a new annexation petition. Immediately thereafter, on May 8, 2013, Haring and Clam Lake hatched an ill-conceived scheme to enter into another Act 425 Agreement. The second agreement was both introduced and approved at a joint special meeting of the Clam Lake and Haring Township Boards. Appellants' Appendix, 14a. Attorney Ronald Redick represented both townships in connection with the Act 425 Agreement. The agreement took effect on June 10, 2013. *Id.* at 723a.

On June 5, 2013, *before* the Act 425 Agreement took effect, TeriDee filed its second annexation petition, which is the subject of this appeal. *Id.* at 761a. Not surprisingly, the Townships objected to the annexation, arguing again that the Act 425 Agreement divested the Commission of jurisdiction. *Id.* at 857a. The Commission found that the annexation petition was legally sufficient by way of a memorandum dated July 17, 2013. Appellee's Appendix, 032b. The memorandum "recommend[ed] that the Boundary Commission examine the validity of this [Act 425] agreement following a review of the evidence to be provided at a public hearing in Wexford County[.]" *Id.*, 033b.

### III. State Boundary Commission Decision

After conducting a public hearing and reviewing submissions by interested parties (including TeriDee, the Townships, and the City), the Commission again concluded that the Townships' Act 425 Agreement was a sham, and this time it approved the annexation. In its "Summary of Proceedings, Findings of Fact and Conclusions of Law" dated June 11, 2014, the Commission made a finding of fact that the Act 425 Agreement "was invalid because it was not being used to promote economic development." Appellants' Appendix, 13a. In support of that conclusion, the Commission made the following findings of fact:

- a. The economic development project that is allowed by the 425 Conditional Transfer is **not believed by the Commission to be viable**. The developer, and majority owner of the land encompassed, was not involved in the development of, or contacted for input on, the 425 Conditional Transfer before it was signed by the Townships.
- b. **Clam Lake Township received no benefit from the agreement**, i.e., there is no revenue sharing included. The Charter Township of Haring would receive all tax revenue.
- c. Copies of email correspondence between Clam Lake and Haring Township officials and area residents were obtained by the petitioner and provided to the Commission. These emails **discuss the 425 Conditional Transfer as a means to deny the Commission jurisdiction over the proposed annexation and prevent development of the area**. See Exhibit D.

- d. The Charter Township of Haring's ability to effectively and economically provide the defined public services including **adequate water pressure in the event of a fire.**
- e. The timing of the 425 Conditional Transfer.
  - i. The development of the agreement was not initiated until after the Townships learned that an annexation request was going to be filed.
    - A. On Monday, April 15, 2013 an email from George Giftos, member of the Haring Township Planning Commission, to Clam Lake and Haring Township officials and area residents **discussed the 425 Conditional Transfer as a means to deny the Commission jurisdiction over the proposed annexation and prevent the development of the area.** (See Exhibit D.) This email:
      - a. Mentions the rumor that TeriDee, L.L.C will file an annexation petition with the State Boundary Commission on June 4.
      - b. Opines that "the reason that the 425 agreement with Haring Twp. was thrown out by the State Boundary Commission was that it was deemed to be a ploy and had been filed AFTER the filing by Terri-Dee (sic) for annexation. If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply."
      - c. Further states, "Clam Lake Twp. is planning on meeting with their attorney to investigate what other options may be available to them in a closed session Wednesday night. Haring Twp. will have a special meeting at 3pm tomorrow (Tuesday)."
- 2. On May 8, 2013, the 425 Conditional Transfer was the subject of a public hearing and was approved by both Townships at a special joint meeting on the same night.

*Id.* at 13a-14a. The Commission also made findings of fact regarding the merits of the annexation petition, which were “based on the criteria specified in Section 9 of the State Boundary Commission Act [1968 PA 191, MCL 123.1009]”:

- a. *Need for community services; the probable future needs for services; the probable effect of the proposed incorporation and of alternative courses of action on the cost and adequacy of services in the area.*
  - i. The economic development project planned by the petitioners requires connection to public water and sanitary sewer services in order to be constructed. These services are available immediately from the City of Cadillac. It is unknown when these services would be available from the Charter Township of Haring.
- b. *The present cost and adequacy of governmental services in the area.*
  - i. Clam Lake Township can only supply public water and sewer services via a 425 Conditional Transfer with the Charter Township of Haring that would require an estimated \$1-2 million dollars in additional construction costs than the infrastructure available from the City of Cadillac. The infrastructure is immediately available from the City of Cadillac. It is unknown when these services would be available from the Charter Township of Haring.
- c. *The practicability of supplying such services in the area.*
  - i. The infrastructure connection from the Charter Township of Haring is dependent on a number of factors, including local governmental action, procurement of easements, construction of additional pumping stations and the completion of the Haring Township Wastewater Treatment Plant. The timeframe to receive these services from the Charter Township of Haring is unknown, while the services available from the City of Cadillac can be accessed immediately.
- d. *The past and probable future growth, including increase and business, commercial and industrial development in the area.*
  - i. The economic development project planned by the petitioners will create new jobs in the area during construction and after it is built out.

*Id.* at 14a-15a. The Commission therefore recommended by a vote of 4 to 1 that the Director of the Department of Licensing and Regulatory Affairs approve the annexation petition. *Id.* at 15a.

On June 26, 2014, the Director of the Department of Licensing and Regulatory Affairs entered his Final Decision and Order, which ordered that the annexation is approved and that “the conditional transfer of territory in Clam Lake Township to the Charter Township of Haring filed with the Michigan Secretary of State on June 10, 2003, and the amendment thereto subsequently filed, is invalid.” *Id.* at 127a.

#### IV. Circuit Court Appeal

The Townships thereafter appealed by right to the Wexford County Circuit Court. *Id.* at 5a. The Townships filed numerous motions – including motions to stay proceedings, to supplement the record, and to allow supplemental briefing – and submitted four briefs on the merits (a brief on appeal and three separate reply briefs directed at the briefs filed by the City, TeriDee, and the Attorney General). *Id.* at 5a-7a. Suffice it to say, the Townships had ample opportunity to present their arguments to the circuit court.

In those many filings, the Townships made outrageous and unsubstantiated allegations. They accused the Attorney General of accepting a bribe from TeriDee's owners (Appellee's Appendix, 059b), and they alleged that the Attorney General was intentionally concealing documents. Appellee's Appendix, 070b-071b. Neither allegation was substantiated. Later in the proceedings, the Townships blamed the Commission's decision on partisan politics, alleging that the Commission made a "whimsical" decision allegedly "in favor of Republican-connected, private development interests." Appellee's Appendix, 081b.

After the many motions and briefs, and after oral argument, the circuit court issued a 15-page "Opinion on Appeal," affirming the Commission's decision. Appellant's Appendix, 130a. The circuit court reviewed the record evidence and determined that the Commission's finding that the Act 425 Agreement was a sham, and its decision to approve the annexation, were both supported by competent, material, and substantial evidence on the whole record. *Id.* at 130a-144a. The circuit court further held that the Commission's decision was not arbitrary, capricious, or a clear abuse or unwarranted exercise of discretion. *Id.*

## V. Applications for Leave to Appeal

The Townships thereafter filed an Application for Leave to Appeal to the Michigan Court of Appeals, which was denied “for lack of merit in the grounds presented” in an Order dated May 26, 2015. *Id.* at 9a.

The Townships then filed an Application for Leave to Appeal to this Court. This Court granted leave to appeal, over the objection of Appellees and amicus curiae party, the Michigan Municipal League, and directed the parties to address the following issues:

- (1) whether *Casco Twp v State Boundary Comm’n*, 243 Mich App 392, 399 (2000), correctly held that the State Boundary Commission (SBC) has the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 et seq. (Act 425);
- (2) if so, whether the SBC in this case properly determined that the appellant townships’ Act 425 Agreement was invalid; and
- (3) whether, despite the language of MCL 117.9(6) and MCL 123.1012(3) (providing a two-year waiting period before resubmission of a petition for annexation), the doctrine of collateral estoppel applied to invalidate the SBC’s 2014 approval of the appellee property owner’s petition for annexation on the basis of the SBC’s denial of the same property owner’s petition in 2012.

## VI. Companion Case

This Court also granted leave to appeal in the case of *TeriDee LLC v Haring Charter Twp* (Docket No. 153008), and directed that it be heard with this appeal. In the companion case, TeriDee filed suit against Haring seeking a declaration that the Townships’ Act 425 Agreement was invalid as an illusory agreement designed to deprive the Commission of jurisdiction over the annexation petition, and that the agreement was against public policy because it contracted away Haring’s legislative zoning powers. The circuit court held that the Commission had primary jurisdiction to determine whether the Act 425 Agreement was a sham, but it granted summary



disposition in favor of TeriDee on the second count and held that the Act 425 Agreement was void as against public policy. Appellee's Appendix, 083b-112b.

For the reasons set forth below, the City requests that this Court affirm the decisions of the State Boundary Commission and Wexford County Circuit Court.

## ARGUMENT

### **I. *Casco* was correctly decided and should be affirmed.**

In the Order granting leave to appeal, this Court first asks whether *Casco* correctly held that the State Boundary Commission has the authority to determine the validity of an Act 425 Agreement. The City submits that *Casco* was correctly decided and that administrative agencies *must* have authority to determine their own jurisdiction – which includes determining whether an Act 425 Agreement is “in effect,” such that it divests the Commission of jurisdiction. Accordingly, *Casco* should not be overturned.

#### **A. *Casco* should be upheld under the doctrine of stare decisis.**

This Court has held that “[u]nder the doctrine of stare decisis, ‘principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed.’” *McCormick v Carrier*, 487 Mich 180, 209-210; 795 NW2d 517 (2010), *quoting Brown v Manistee Co Rd Comm’n*, 452 Mich 354, 365; 550 NW2d 215 (1996). Rather, to “‘avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .’” *McCormick*, 487 Mich at 210, *quoting Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009). This Court and the Supreme Court of the United States have both recognized that this doctrine “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *McCormick*, 487 Mich at 210, *quoting Payne v Tennessee*, 501 US 808, 827 (1991).

Because of the importance of this doctrine, “there is a presumption in favor of upholding precedent[.]” *McCormick*, 487 Mich at 210. This presumption can only be overcome “if there is a special or compelling justification to overturn precedent,” which “requires more than a mere

belief that a case was wrongly decided.” *Id.* at 210. Overturning precedent requires this Court to “review whether the decision at issue defies ‘practical workability,’ whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.” *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

Here, *Casco* was not wrongly decided, for the reasons discussed later in this brief. But as a preliminary matter, even if this Court believes that *Casco* reached the wrong conclusion, that in itself is not sufficient to overturn the decision. The presumption in favor of upholding *Casco* can only be overcome upon a showing of a “special or compelling justification” – which has not been shown or even alleged in this appeal. The Townships have only submitted that they believe (erroneously) that *Casco* was a “bad turn” in administrative law, but they point to no intervening changes in the law that would warrant revisiting the *Casco* decision. (Townships’ Brief, p. 10.)

Moreover, the Townships have not demonstrated that the *Casco* holding defies practical workability. To the contrary, *Casco* has been relied upon by the Commission, municipalities, and developers. Changing the state of the law would create an undue hardship, which weighs against overturning *Casco*. *See Robinson*, 462 Mich at 464. Unlike in *McCormick*, where this Court found it “unlikely that motor vehicle drivers, and the victims of motor vehicle accidents, have altered their behavior in reliance on *Kreiner*<sup>3</sup>,” developers and municipalities **have** relied on *Casco*. Developers who are making multimillion dollar investment decisions, and the local governments who support or oppose those developments, must be able to depend on the predictability of the judiciary when deciding how to proceed. Departure from established, binding case law, on which large-scale development decisions have been based, would erode confidence in the legal system and create undue hardship.

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<sup>3</sup> *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

Notably, **this Court denied leave to appeal in the *Casco* case** and thereby rejected the opportunity to reverse the decision. *See* 465 Mich at 855. If this Court believed that the Court of Appeals got in wrong in *Casco*, then it could have granted leave to consider reversal, but instead, this Court decided that the published opinion in *Casco* should stand undisturbed. Nothing has materially changed in the 15 years since *Casco* was decided. This is not a situation in which the underlying statutory scheme has been amended, nor has the precedent led to inconsistent results and unequal treatment, as in *McCormick* when this Court overturned *Kreiner*. Simply put, there has been no intervening change that would warrant the upending of *Casco*. The City therefore urges this Court to follow the decision it made in 2001 when it denied leave to appeal, and allow *Casco* to stand undisturbed.

B. Administrative agencies are competent to determine their own jurisdiction.

Turning to the substance of *Casco*, the *Casco* court correctly recognized that administrative agencies, including the State Boundary Commission, must have authority to determine their own jurisdiction. This holding was based on this Court’s prior decisions and is consistent with black-letter administrative law.

1. *The Commission must review a purported Act 425 Agreement to determine whether it is “in effect” and, therefore, whether it strips the Commission of jurisdiction.*

This Court has long held that an administrative agency is “competent to determine its own jurisdiction.” *Judges of 74th Judicial Dist v County of Bay*, 385 Mich 710, 728-29; 190 NW2d 219 (1971); *see also* *Petition for Labor Mediation Bd v Jackson County Rd Comm’n*, 365 Mich 645, 655; 114 NW2d 183 (1962) (labor mediation board had authority to “determine if the petition presented to it properly invoked its jurisdiction”); *see also* *Smigel v Southgate Community School Dist*, 388 Mich 531, 555; 202 NW2d 305 (1972) (“it has been held that the administrative agency has the authority in the first instance to determine its own jurisdiction and

that injunction or declaratory judgment will not lie to challenge the jurisdiction of an administrative agency”).

This conclusion is consistent with the doctrine of primary jurisdiction, which requires that administrative agencies, rather than courts, determine matters that are within their area of expertise:

The doctrine of primary jurisdiction also reflects practical concerns regarding respect for the agency's legislatively imposed regulatory duties. Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency. "A question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required."

*Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733 (2001).

*Casco* was based on these fundamental principles of administrative law. The *Casco* court held that the Commission, like other administrative agencies, was competent to determine its own jurisdiction. *Casco*, 243 Mich App at 399 (“an administrative agency is competent to determine its own jurisdiction”), quoting *Judges of the 74th District*, 385 Mich at 728-29. Overturning that conclusion would upend decades of firmly-rooted administrative case law.

To determine whether it has jurisdiction over an annexation petition when a purported Act 425 Agreement exists, *Casco* held that the Commission must be able to look at the Act 425 Agreement to ensure that it is in, in substance, a bona fide Act 425 Agreement:

According to the townships, any document purporting to be an Act 425 agreement, once signed and filed according to the specified procedure, absolutely bars any action on the part of the commission concerning the same territory, without regard to the substance of the agreement. We disagree. *Id.* at 399.

To hold otherwise would allow a township to game the system and manufacture an illusory “agreement” that does not, in fact, qualify as an Act 425 Agreement – which is exactly what happened in this case. To ward off such an outcome, the *Casco* court held as follows:

In light of the broad grant of statutory authority to the commission over matters relating to the establishment of boundaries and annexations, we hold that the commission had the authority and jurisdiction to decide the validity of the Act 425 agreements. Logic dictates that the commission had the authority to consider the validity of two agreements that, if valid, would have barred its authority to process, approve, deny, or revise a petition or resolution for annexation. The commission would not otherwise have been able to perform its function of resolving the petition. *Id.*

Thus, the *Casco* court held that the Commission could properly determine whether it had jurisdiction over an annexation petition by determining whether an Act 425 Agreement was “in effect.” Making this determination is necessary because of the language of Section 9 of Act 425:

**While a contract under this act is in effect,** another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.

MCL 124.29 (“emphasis added”). For the Commission to determine whether it has jurisdiction over an annexation petition (which it indisputably has the power to decide), the Commission must determine whether an Act 425 Agreement is “in effect” – i.e., whether it is a bona fide agreement under Act 425, or a sham document posing as an Act 425 Agreement for the sole purpose of thwarting the Commission’s jurisdiction. The *Casco* court correctly decided that the Commission has the authority to review the Act 425 Agreement *solely for that purpose*.

Importantly, *Casco* did not give the Commission the sweeping power to *invalidate* the Act 425 Agreement or dictate the contracting parties’ rights or obligations. The Commission only decides whether a purported Act 425 Agreement is “in effect,” such that it divests the Commission of its jurisdiction over the annexation petition. The impact of this decision is

limited to the annexation proceeding, which is why the Commission, not the circuit court, is the proper tribunal to make this decision.

The *Casco* holding was not “a stark and shocking departure” from existing administrative case law, as the Townships allege. (Townships’ Brief, p. 14.) Quite the opposite is true: *Casco* applied this Court’s prior case law and held that the Commission must be able to review an Act 425 Agreement *for the sole purpose of* determining whether the agreement vests the Commission of its jurisdiction. Absent this holding, any piece of paper titled “Act 425 Agreement” would automatically strip the Commission of its jurisdiction, regardless of the substance of the purported agreement. The Commission would lack authority to even read the purported agreement. Indeed, that is precisely the result advocated by the Townships in this case. Such an absurd and unjust result – that the Commission cannot look at the substance of the document that purports to divest its jurisdiction, but must instead disavow the entire proceeding upon being informed that it is an Act 425 Agreement – must be avoided.

2. *The Townships’ position would lead to unnecessary ancillary litigation every time the Commission is presented with an Act 425 Agreement.*

The Townships assert that in lieu of the Commission reviewing a purported Act 425 Agreement, the party seeking annexation should file an independent circuit court action for review of the agreement. (Townships’ Brief, p. 16.) This “solution” is contrary to the case law discussed above, which gives the Commission the ability to determine its own jurisdiction without turning to the judiciary. And this “solution” is unworkable and burdensome as a practical matter. The Townships would require a collateral circuit court action to be filed *every time* an Act 425 Agreement is presented to the Commission. This means that circuit courts will be put in the position of deciding the Commission’s jurisdiction in potentially routine

proceedings, thereby unnecessarily increasing litigation and exponentially increasing the costs of annexation proceedings.

Notably, the Townships themselves have argued that the Commission, and *not* the circuit court, has jurisdiction to determine the validity of the Act 425 Agreement. In the companion case, the Townships affirmatively argued that the Commission “**is not only capable of determining the validity of Act 425 agreements, but is uniquely suited to do so, since such determinations must be made in every annexation case involving an Act 425 agreement.**” Appellee’s Appendix, 116b. The Townships therefore insisted that the Commission, not the circuit court, should review the validity of their Act 425 Agreement under the doctrine of primary jurisdiction. *Id.* On this, the City agrees, as did the *Casco* court: the Commission, not the circuit court, is the proper body to determine whether an Act 425 Agreement divests the Commission of its jurisdiction over an annexation petition. *Casco* should therefore be upheld.

C. This Court should not overturn *Casco* on the facts of this case.

Even if this Court were inclined to overturn *Casco*, this is not the right case for such a decision because the facts do not provide grounds for setting aside the Commission’s approval.

First, regardless of the (illusory) “substance” of the Act 425 Agreement, the Act 425 Agreement may not have been “in effect” when the second annexation petition was filed based on the timing. Section 9 of Act 425 provides that “[w]hile a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.” MCL 124.29. TeriDee filed its second annexation petition on June 5, 2013. But the Townships’ Act 425 Agreement did not take effect until June 10, 2013. Thus, when the Commission obtained jurisdiction over the annexation petition on June 5, 2013, there was no Act 425 Agreement “in effect.” To afford relief to the Townships, this Court must



also determine whether the Act 425 Agreement must be “in effect” when the annexation petition was filed – which, in this case, it clearly was not.

Second, this appeal is inextricably linked with the companion case, in which the developer, TeriDee, sued the Townships in circuit court to set aside the Act 425 Agreement. In that companion case, the circuit court struck down the Act 425 Agreement on grounds unrelated to the issue in this appeal. For the Townships to prevail in these appeals, this Court would have to reverse both the Commission’s approval of the annexation petition *and* the circuit court’s independent determination that the Act 425 Agreement was void as against public policy, and then ultimately remand the case to the circuit court for yet another determination of whether the Act 425 Agreement was a sham. This appeal has many “moving parts,” and even a determination that *Casco* was incorrectly decided would not, in itself, necessitate judgment in favor of the Townships.

Ultimately, the Townships are *not* entitled to any relief from this Court, nor have they shown that *Casco* should be overturned. The Townships attack *Casco* because it so squarely prohibits the unfair gamesmanship in which the Townships have engaged by adopting a sham Act 425 Agreement. Given the history of this case, including the Townships’ prior sham Act 425 Agreement in 2011, and the decisions of both the circuit court and the Commission condemning the illusory and unenforceable nature of the 2013 Act 425 Agreement, one must ask: how many times do the Townships need to be told that their Act 425 Agreement is a sham? How many courts must strike it down, and on how many bases? When will enough be enough?

The Townships will undoubtedly continue to oppose economic development in the Cadillac area, but their use of the court system to thwart job creation, delay economic growth, and achieve political goals should end here. This case, replete with the Townships’ false

allegations of bribery against the Attorney General and hysterical “sky is falling” rhetoric, does not present grounds for overturning established precedent. Rather, the City requests that this Court affirm the circuit court’s decisions and uphold the *Casco* decision.

**II. The State Boundary Commission properly determined that the Townships’ Act 425 Agreement was invalid.**

Because the Commission was competent to determine its own jurisdiction, the Commission was within its authority to review the Townships’ Act 425 Agreement. As a factual matter, the Commission’s finding that the Act 425 Agreement was a “sham” agreement was supported by competent, material, and substantial evidence on the record and should be affirmed.

**A. Standard of Review**

As they did in the circuit court, Court of Appeals, and their Application, the Townships attempt to stretch case law to argue that this Court should review *de novo* the State Boundary Commission’s factual findings concerning the Townships’ Act 425 Agreement. Specifically, the Townships assert that the State Boundary Commission’s interpretation of a statute (Act 425) is a question of law that is reviewed *de novo*. (Townships’ Brief, p. 18.)

The Townships’ argument fails because the Commission was not called upon to interpret a statute; rather, the Commission determined whether, as a factual matter, the Townships’ Act 425 Agreement was a “sham” agreement, and thus ineffective in depriving the Commission of jurisdiction over the annexation proceedings. The Court of Appeals in *Casco* specifically held that the Commission’s conclusion that an Act 425 agreement is illusory is reviewed under the “competent, material, and substantial evidence” standard – *not* the *de novo* standard. *Casco*, 243 Mich App at 399.

*Casco* is consistent with well-settled authority from this Court, which recognizes that the scope of review of the Commission’s decisions is narrow. *Midland v Mich State Boundary*

*Comm’n*, 401 Mich 641, 673-74; 259 NW2d 326 (1977) (holding that “the judiciary ought to be **especially circumspect** in reviewing [state boundary] commission rulings and determinations”). The Court of Appeals has likewise recognized the judiciary’s narrow review of annexation decisions, holding that the appellate court’s review “must be undertaken with considerable sensitivity in order that the courts **accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding** by displacing an agency's choice between two reasonably differing views.” *St Joseph v Mich State Boundary Comm’n*, 101 Mich App 407, 411; 300 NW2d 578 (1980), quoting *Mich Employment Relations Comm’n v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974) (emphasis added).

To ensure that appropriate deference is afforded, the appellate courts have found that the State Boundary Commission’s decisions are reviewed “for a determination [of] whether the administrative action is supported by ‘competent, material and substantial evidence on the whole record.’” *Midland*, 401 Mich at 672; see also *St Joseph*, 101 Mich App at 412. That is consistent with *Casco*, which found that the exact decision under review here – whether an Act 425 Agreement is a “sham agreement” – is reviewed under the competent, material, and substantial evidence standard.

Despite that authority, the Townships urged the circuit court and Court of Appeals (and now this Court) to sit as a *de novo* fact-finding body and decide, without any deference to the State Boundary Commission, whether the Act 425 Agreement was, as a question of fact, a sham. Such review is clearly contrary to *Casco*, *Midland*, *St Joseph*, and every other annexation case in the state. The circuit court was not being called upon in the first instance to decide whether the Townships’ Act 425 Agreement was a sham; the Commission has already heard arguments and received evidence on that issue and rendered a decision based on its findings of facts. The

review of the Commission's decision by the circuit court regarding the Act 425 Agreement and the approval of the annexation was limited, and the circuit court was required to affirm the Commission's decision if it found it to be supported by competent, material, and substantial evidence on the record, even if the circuit court might have reached a different decision based on that evidence. *See Kester v Sec'y of State*, 152 Mich App 329, 335; 393 NW2d 623 (1986).

The circuit court applied the correct standard of review and concluded that the Commission's decision was supported by competent, material, and substantial evidence on the whole record. That decision should be affirmed.

B. The Commission correctly found that the Townships' Act 425 Agreement, approved in 2013, was a sham like the agreement in *Casco*.

Central to these annexation proceedings have been the Townships' successive Act 425 Agreements, which the Commission has *twice* found to be sham agreements under *Casco*.

In *Casco*, the Court of Appeals held that the Act 425 agreements entered into between neighboring townships were nothing more than "fictional agreements intended only to deprive the [State Boundary Commission] of jurisdiction." *Id.* at 398-99. The court found that the townships did not have any "real plan for economic development" and that the Act 425 agreements were adopted solely to "ward off any attempts by municipalities to annex a portion of the [t]ownships." *Id.* at 402. Consequently, the Court of Appeals held that the Act 425 agreements were "illusory" and therefore did not bar the State Boundary Commission from approving the annexation.

Here, the Commission found that the Townships' Act 425 Agreement was a sham for numerous reasons, all of which were supported by the record. The Commission wrote four pages of factual findings in its Summary of Proceedings, Findings of Fact, and Conclusions of Law. Appellants' Appendix, 12a-15a. First, the Commission noted that TeriDee "was not involved in

the development of, or contacted for input on, the [Act 425 Agreement] before it was signed by the Townships.” *Id.* at 13a. Based on that record evidence, the Commission found that excluding the developer from a so-called economic development plan shows the illusory nature of the agreement. *Id.*

The Commission further found that the Act 425 Agreement was a sham because “Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included.” *Id.* This finding is supported by the plain language of the Act 425 Agreement. The Act 425 Agreement is blatantly one-sided in favor of Haring and includes a sweepingly broad, one-way indemnification and hold harmless provision, which puts Clam Lake on the hook for the costs of any proceedings arising out of the agreement. *Id.* at 750a. Clam Lake is also required to pay all of Haring’s costs and expenses, including **actual** attorney fees, arising out of the drafting and obtaining approval of the agreement, implementing new zoning requirements, and returning jurisdiction to Clam Lake upon termination of the agreement. *Id.* at 750a-751a. Even more significantly, the agreement requires Clam Lake to be “solely responsible” for paying and financing *all* of Haring’s costs for constructing water and wastewater infrastructure. *Id.* at 729a.

In exchange for this tremendous liability, the Commission found that Clam Lake would receive **no revenue sharing**. *Id.* at 13a. The Commission had held the prior (2011) agreement to be invalid, in part, because Clam Lake received no benefit (no revenue sharing), and yet the new agreement also provided no revenue sharing. Such an agreement is so blatantly one-sided and unfair that no reasonable municipal official would approve it on behalf of Clam Lake unless the parties knew that the agreement was merely a sham intended to divest the Commission of its jurisdiction to consider the annexation petition. Thus, the Commission again found the Act 425 Agreement to be a sham, based on competent, material, and substantial evidence in the record.

At the public hearing held before the Commission on October 25, 2013, the Townships' joint counsel Mr. Redick boldly proclaimed that this time there are no incriminating e-mails – “*they don’t exist.*” *Id.* at 437a. That statement was false, and incriminating e-mails were in fact discovered and submitted to the Commission as a part of the record. At that same public hearing, George Giftos appeared and advised the Commission that he sits on the Haring Township Planning Commission and discussed both the zoning and development of the subject property in that context. Mr. Giftos, despite the revealing and incriminating e-mails that began in April of 2013, then falsely claimed that Haring Township sees the inevitability of commercial development of the property. *Id.* at 1011a.

The Commission relied on the damaging e-mails between the Townships' officials concerning the Act 425 Agreement. *Id.* at 14a. In their Brief, the Townships (after having first denied that the e-mails even existed) intentionally misrepresent that the e-mails were merely “the uninformed personal opinions of one neighborhood gadfly.” (Townships' Brief, p. 36.) This description is deliberately misleading because – as the Commission found – the e-mails were exchanged between several of the Townships' officials, including Haring Township Planning Commissioner George Giftos, Clam Lake Township Supervisor Dale Rosser, and Haring Township Supervisor Bob Scarbrough. While the Townships would like nothing better than to distance themselves from Mr. Giftos now for obvious reasons, referring to Mr. Giftos merely as a “neighborhood gadfly” is intentionally misleading and false.

The Township falsely denied that any e-mails existed and then falsely told the Commission that “[t]he timing of their Act 425 Agreement was not influenced” by the fact that TeriDee “might reapply [for annexation] in June 2013.” *Id.* at 1483a. The Townships claimed

that a new annexation petition was a “well-known fact,” and that the Township officials were “all quite able” to predict that a new petition would be filed. *Id.* at 1482a.

But as the Commission correctly found, the e-mails establish that a “rumor” about a new annexation petition spurred the Townships to begin throwing together a new, illusory Act 425 Agreement. *Id.* at 14a. Specifically, an e-mail from George Giftos (Haring Township Planning Commissioner) to numerous individuals, including Dale Rosser (Clam Lake Township Supervisor) and Mike Lueder (Clam Lake Township Downtown Development Authority Vice-Chair), dated April 15, 2013, states as follows in relevant part:

“**New developments** in an issue we thought had been put to rest . . .

**The rumor is that Teri-Dee will re-file for annexation to the City on June 4.** How can that happen, you ask? I thought we had 2 years before they could file again. Well, we did, but it’s 2 years from the original date of their filing and that was June 4, 2 years ago! **If they fast-track the project and the State Boundary Commission approves, Terri-Dee [sic] could conceivably be all set to go by the end of summer.”**

(*Id.* at 1874a, emphasis added.) This e-mail was sent just four days after a City official disclosed that TeriDee would be filing a new annexation petition. Moreover, Haring Planning Commissioner Giftos’s characterization of the “rumor” as a “new developmen[t]” certainly does not suggest that it was a “well-known fact,” as the Townships alleged at the Commission.

But Haring Planning Commissioner Giftos had a plan for the Townships to thwart the annexation, which he included in the same e-mail message:

Now, **what are our options?** As I see it, the reason that the 425 agreement with Haring TWP was thrown out by the State Boundary Commission was that it was **deemed to be a ploy** and had been filed AFTER the filing by Terri-Dee [sic] for annexation. **If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply.**

*Id.* at 1874a. This e-mail shows that on April 15, 2013 – just days after they learned of TeriDee’s forthcoming petition – the Townships (“we”) were already devising a scheme to block

the annexation by approving a new Act 425 Agreement. Haring Planning Commissioner Giftos noted that the previous sham Act 425 Agreement failed because it was “deemed to be a ploy and had been filed AFTER” the annexation petition, but if the Townships were to approve a new Act 425 Agreement *before* the annexation petition was filed, then the Townships would be able to thwart annexation. The Townships’ intentions could not be clearer.

The e-mail continues on to discuss Clam Lake’s negotiations with Haring Township for sewer services, but Mr. Giftos stated that “[t]he only drawback to this is that **these services are not immediately available** but will be within a few years . . .” *Id.* at 1874a. This shows that Haring was not able to provide services immediately. Conversely, the City stood ready to provide immediate, economical water and sewer services, as the Commission found.

Haring Planning Commissioner Giftos also noted in the e-mail that “Clam Lake TWP is planning on meeting with their attorney to investigate what other options may be available to them in a closed session Wednesday night [April 17, 2013]. Haring TWP will have a special meeting at 3PM tomorrow (Tuesday) [April 16, 2013], which I will attend.” *Id.* at 1874a. Shortly after Clam Lake’s meeting, on April 21, 2013, Haring Planning Commissioner Giftos e-mailed Clam Lake Supervisor Dale Rosser:

Hi Dale,

What was the result of the meeting between you, the Clam Lake TWP attorney and Bob Scarbrough this week? **I know we don’t want to tip our hand** but is there anything I can pass along as far as the course of action we plan to take is concerned?  
George

*Id.* at 1877a. Clam Lake Supervisor Rosser then sent Haring Planning Commissioner Giftos a coy response on April 24, 2013:

George,

Nothing to say at this time. We were just exploring options that may be available to us.



hopefully [sic] more to come.

Dale

*Id.* at 1879a.

Later, on May 4, 2013, Haring Planning Commissioner Giftos sent a message to Clam Lake Supervisor Rosser and Haring Supervisor Bob Scarbrough, discussing his conversation with Clam Lake DDA Vice-Chair Mike Lueder. *Id.* at 1881a. Haring Planning Commissioner Giftos explained that Clam Lake DDA Vice-Chair Lueder “**wants me to continue to oppose any commercial development of the TerriDee [sic] property, an[d] if that goes down to defeat, so be it. We at least have fought the battle and been consistent.**” *Id.* at 1881a.

Haring Planning Commissioner Giftos also admitted that the PUD requirements proposed by the Townships in the Act 425 Agreement would thwart, not promote, economic development of the TeriDee property:

I also told him my personal feeling that if I were bringing a retail business to Cadillac, and I were to investigate this PUD with its restrictions, I would choose to locate at Boon Road where the other commercial development is going on, so I feel that **while we would allow commercial development at M55, it wouldn't happen.**

*Id.* at 1881a. Thereafter, the Townships approved the new Act 425 Agreement with those restrictive PUD requirements.

The impact of these e-mails was not lost on the Commission: These e-mails and the consistent use of the word “we” show Haring Planning Commissioners Giftos’s active participation as a township official and not merely “the personal opinions of one neighborhood gadfly,” as the Townships characterized the e-mails to the circuit court and now to this Court. Even worse, the e-mails prove that the “new and improved” Act 425 Agreement was hastily contrived after the Townships learned that TeriDee would be filing a new annexation petition.

The Townships intentionally approved the Act 425 Agreement before the deadline for filing the annexation petition so that it would not look like a “ploy” – which is exactly what it was. The e-mails further make clear that the Act 425 Agreement was designed to block economic development, not promote it. Haring Planning Commissioner Giftos openly stated that if he were a commercial developer, he would **not** develop the TeriDee property with the restrictive PUD requirements in the Townships’ Act 425 Agreement. *Id.* at 1881a. The Townships knew that economic development simply **“wouldn’t happen”** under their sham Act 425 Agreement. In fact, they openly opposed **“any economic development”** of the TeriDee property. The e-mails confirm what the Townships insinuate in their brief: the Townships oppose real development of the Property and will do anything to stop it.

The Commission received the incriminating e-mail evidence as part of the record and relied on them and other evidence to conclude that the Act 425 Agreement was an invalid sham agreement, designed to divest the Commission of jurisdiction and prevent economic development of the property. *Id.* at 14a. The e-mails constitute competent, material, and substantial evidence in support of the Commission’s conclusion that the Townships’ Act 425 Agreement was a sham. The circuit court agreed, noting that “the activities of the Townships in response to learning of the current annexation petition led to a quick and unplanned enactment of the Act 425 Agreement which is born out by substantial evidence.” *Id.* at 137a.

The Commission found that the timing of the Act 425 Agreement revealed its illusory nature. In its Findings of Fact, the Commission concluded that “[t]he development of the agreement was not initiated until after the Townships learned that an annexation request was going to be filed.” *Id.* at 14a. In making this finding, the Commission relied on correspondence in the record confirming that the Act 425 Agreement was contemplated after word leaked that

TeriDee would be filing a new annexation petition. *Id.* at 14a. This, too, is competent, material, and substantial evidence that supports the Commission's decision.

Based on the record evidence, the Commission made well-supported findings of fact and concluded that the Townships' Act 425 Agreement was invalid as a "sham" agreement. That decision was supported by competent, material, and substantial evidence on the record, as the circuit court correctly held – even if a different conclusion could have been reached based that evidence. *See Kester*, 152 Mich App at 335.

C. The Commission's decision to approve the annexation was supported by competent, material, and substantial evidence on the whole record.

After the Commission determined that the Townships' Act 425 Agreement was a sham, the Commission recommended approval of the annexation request. The Commission's decision to recommend approval of the annexation was supported by hundreds of pages of record evidence. In reviewing that record evidence, the Commission made several factual findings based on the statutory criteria, which is set forth in the Commission's written decision, and found that those criteria supported approval. *Id.* at 14a-15a. The circuit court correctly affirmed the Commission's decision, finding that it was supported by competent, material, and substantial evidence on the whole record.

The record is clear that the Commission considered all of the statutory criteria in approving the annexation request: "The State Boundary Commission has considered the requirements in section 9 of 1968 PA 191, MCL 123.1009 and has come to the conclusion that these criteria support the majority vote of the Commission." *Id.* at 15a. The Commission analyzed various criteria in detail, including the need for community services; the probable future needs for services; the probable effect of the annexation and of alternative courses of action on the cost and adequacy of services in the area; present cost and adequacy of

governmental services in the area; the practicability of supplying services in the area; and the past and probable future growth in the area. *Id.* at 14a-15a.

The Commission properly evaluated the statutory criteria and decided to approve the annexation. That discretionary decision, described by this Court as an “essentially political question,” is reserved for the Commission. The Commission based its decision on its voluminous and well-developed record, including documents and arguments presented by the Townships, the City, and TeriDee. Because its decision was supported by competent, material, and substantial evidence on the record, and because the circuit court properly affirmed the decision, the circuit court’s decision should be affirmed.

**III. The State Boundary Commission’s approval of the annexation petition was not barred by the doctrine of collateral estoppel.**

In its Order, this Court directed the parties to address whether, despite the language of MCL 117.9(6) and MCL 123.1012(3) (providing a two-year waiting period before resubmission of a petition for annexation), the doctrine of collateral estoppel applied to invalidate the Commission’s 2014 approval of TeriDee’s annexation petition based on the Commission’s 2012 denial of TeriDee’s 201 annexation petition.

As explained below, the Townships did not timely raise collateral estoppel, and this issue is therefore not preserved for appeal. In any event, the unambiguous statutory language only prohibits the re-filing of a petition within two years after the prior filing of a petition – which, by necessary implication, means that a petitioner *can* file a new petition after the passage of two years. Collateral estoppel cannot operate to thwart express legislative intent. Regardless, the doctrine of collateral estoppel does not apply to this proceeding because the Commission’s approval of annexation petitions is a legislative function, not a judicial function, and collateral estoppel does not apply to legislative decisions by administrative agencies.

A. The Townships' collateral estoppel argument is not properly before this Court.

The Townships did not raise the issue of collateral estoppel in the Commission, and thus it is not preserved for appeal. *See Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (“a litigant must preserve an issue for appellate review by raising it in the trial court”); *see also* MCR 2.111(F) (affirmative defense “must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118”). Collateral estoppel is waived if not set forth in a party's first responsive pleading. *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 402 n 5; 875 NW2d 234 (2015).

Here, despite filing at least six briefs with the State Boundary Commission, the Townships did not claim that TeriDee's 2013 annexation petition was barred by collateral estoppel. Even in their objections to the sufficiency of TeriDee's petition, the Townships made no mention of collateral estoppel. They did not raise collateral estoppel until they filed their appeal in circuit court, which was simply too late. The circuit court recognized this deficiency, noting that “the issue may not be preserved for appeal.” *Id.* at 142a. Thus, the issue of collateral estoppel is not preserved and is not properly before this Court.

B. The doctrine of collateral estoppel does not invalidate the SBC's approval of the annexation petition.

Even if the issue were preserved, the doctrine of collateral estoppel did not preclude the Commission from approving TeriDee's second annexation petition.

1. *The plain language of the statute only bars subsequent petitions within two years after denial of an annexation petition.*

The Michigan Legislature has expressly provided that a new annexation petition may be filed and accepted by the Commission two years after a petition is denied:

The commission shall reject a petition or resolution for annexation of territory that includes all or any part of the territory which was described in any petition or resolution

for annexation filed *within the preceding 2 years* and which was denied by the commission or was defeated in an election under subsection (5).

MCL 117.9(6) (emphasis added).<sup>4</sup>

As this Court is well aware, “if the language [of a statute] is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted.” *McCormick*, 487 Mich at 191-92. The Michigan Court of Appeals has applied this same rule of statutory construction to the statute at issue, MCL 117.9(6). *Avon v Mich State Boundary Comm’n*, 96 Mich App 736, 752; 293 NW2d 691 (1980). In *Avon*, the appellant township argued that an annexation petition filed in 1967 but delayed until November 1972 had the effect of barring a subsequent annexation petition filed in May 1974. *Id.* at 751-52. The *Avon* court held that “there is no ambiguity in [MCL 117.9(6)]” and that the Commission did not err by finding the second petition to be legally sufficient. *Id.*

Further, the Court of Appeals has recognized that the Commission’s interpretation of MCL 117.9(6) “is entitled to the most respectful consideration and should not be set aside without cogent reasons.” *St Joseph v Mich State Boundary Comm’n*, 101 Mich App 407, 414-415; 300 NW2d 578 (1980). Although *St Joseph* involved a different issue (whether the two-year bar applies where the first annexation petition was found to be legally insufficient), the same deference must be afforded here. The Commission has interpreted MCL 117.9(6) to mean exactly what it says: that a subsequent annexation petition may be filed after two years have passed from the filing of the prior (unsuccessful) petition.

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<sup>4</sup> MCL 123.1012, referenced in this Court’s Order, contains a similar two-year reapplication provision for petitions for consolidation. Although the statute is not directly on point in this case, it further shows that the Legislature clearly intended to bar subsequent petitions only for a period of two years.

Regardless of the Commission's interpretation, the statutory language is unambiguous. Under its plain language, a subsequent annexation petition cannot be filed until two years have passed from the filing of any prior petition. After two years, by obvious implication, an annexation petition may be filed with (and accepted by) the Commission. **In other words, by imposing only a two-year bar, the Legislature plainly intended to allow a new annexation petition to be filed after the passage of two years.**

Importantly, the Legislature did not condition a subsequent annexation petition on a material change of factual circumstances, as the Townships suggest. The Legislature could have included such a requirement, but it chose not to, and the omission of that requirement must be deemed intentional. *See, e.g., Griswold Props LLC v Lexington Ins Co*, 276 Mich App 551, 561, 565; 741 NW2d 549 (2007).

Because the statutory language is clear, collateral estoppel cannot be used to thwart the express intention of the Legislature. *See, e.g., Storey v Meijer, Inc*, 431 Mich 368, 370; 429 NW2d 169 (1988) (holding that collateral estoppel did not apply to agency decision where such application would be "contrary to legislative intent and considerations of public policy"). The Townships' collateral estoppel theory therefore fails, and the Commission was not barred from approving TeriDee's second annexation petition.

2. *Collateral estoppel does not apply to legislative agency decisions.*

The Commission's decision was also not barred by collateral estoppel because the doctrine of collateral estoppel "cannot apply" to legislative decisions made by an administrative agency. *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010). The Commission's decision to approve or deny an annexation petition is a legislative function, not a judicial function. *Shelby Charter Tp v State Boundary Comm'n*, 425

Mich 50, 56 n 3; 387 NW2d 792 (1986) (“The changing of the boundaries of political divisions is a legislative question”). Indeed, unlike judicial determinations, the determination of municipal boundaries is purely a political question:

Resolution of a controverted annexation unavoidably involves **political considerations and the exercise of a large measure of discretion.** Evaluation of the record and of the commission's balancing of the criteria and determination of reasonableness implicates the merits of the proposed annexation and **poses considerable risk of drawing the judiciary into the resolution of what continues to be** -- despite the adoption of the administrative format -- **essentially a political question.**

*Midland v Mich State Boundary Comm’n*, 401 Mich 641, 673-74; 259 NW2d 326 (1977) (emphasis added). In *Midland*, this Court concluded that “the judiciary ought to be **especially circumspect** in reviewing [state boundary] commission rulings and determinations.” *Id.* at 674 (emphasis added); *see also Goethal v Bd of Sup’rs of Kent Co*, 361 Mich 104, 113; 104 NW2d 794 (1960) (“The extension of the boundaries of a city or town is viewed as **purely a political matter**, entirely within the power of the State legislature to regulate”).

This Court has also recognized that no party has a vested interest in the outcome of an annexation proceeding:

No city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units. The Legislature is free to change city, village and township boundaries at will.

*Midland*, 401 Mich at 664. This, too, demonstrates the legislative or quasi-legislative nature of annexation proceedings; the Commission is not adjudicating the rights of parties, but rather is making a legislative – and “purely political” – determination of municipal boundaries.

Because the Commission’s approval or denial of annexation petitions is a legislative function and not an adjudicative function, the doctrine of collateral estoppel does not apply. *See*



*In re Consumers Energy*, 291 Mich App at 122 (agency was engaged in legislative function and “thus the doctrines of res judicata or collateral estoppel cannot apply in the pure sense”); *see also Senior Accountants v Detroit*, 399 Mich 449, 457-58; 249 NW2d 121 (1976) (“res judicata and collateral estoppel apply to administrative determinations which are **adjudicatory in nature**”). The Commission was therefore not barred from considering the second annexation petition.

**CONCLUSION**

For these reasons, Appellee City of Cadillac requests that this Court affirm the decisions of the Wexford County Circuit Court and State Boundary Commission.

FOSTER, SWIFT, COLLINS & SMITH, P.C.

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